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Supreme Court of the United States

OCTOBER TERM, 1945

No. 652

McALLISTER LIGHTERAGE LINE, INC.,
Petitioner,

vs.

MARY RIVAS, as Administratrix of the Goods, Chattels and Credits of JOSE RIVAS, deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

The respondent recovered a jury verdict in the United States District Court for the Southern District of New York in the sum of Twenty-five thousand ($25,000.00) Dollars for the wrongful death of her intestate husband under the Jones Act (R. 4). After a three day trial the petitioner offered no defense but rested on the evidence presented by the respondent. The District Court charged that the respondent contended that the petitioner was negligent in that its engineer, LARSEN, failed to warn the intestate, RIVAS, that he, LARSEN, was about to operate the engine, and that that issue, to wit: insufficient warning was the

sole issue before the jury. The jury found in favor of the respondent and the petitioner appealed to the Circuit Court of Appeals for the Second Circuit. The respondent raised on that appeal the identical question which it seeks to raise in this Court, to wit: the insufficiency of evidence. The Circuit Court of Appeals in a comprehensive opinion discussed at great length the evidence before the Court and jury and concluded its opinion in words as follows: (R. 227)

> "Indeed, had we been charged with deciding the facts, we should have unhesitatingly concluded that Rivas was killed exactly as the plaintiff argued."

Relief Sought by Petitioner

Nowhere in the petition is a legal question raised. The contention here, as in the Courts below, is purely a question of fact. Petitioner's whole grievance is that it cannot agree with the jury's interpretation of the evidence presented.

The Circuit Court in its opinion discussed in great detail the evidence upon which the jury might have found that the respondent's intestate met his death by reason of the negligence of petitioner's engineer in failing to warn the said intestate in advance of moving or activating the engine or any part thereof. Far from finding the jury's verdict based on conjecture, the Circuit Court, after considering the evidence in full detail, "unhesitatingly" endorsed the jury's finding that the death of Rivas was caused exactly as respondent contended.

The Facts

Respondent's intestate Rivas was a fireman aboard petitioner's steam lighter. While Rivas was standing on the railing in front of the engine cleaning the engine frame in the regular performance of his duties as fireman he was

struck a crushing blow on the right forehead by the reversing links solely controlled above by the lighter's engineer.

Rivas, and one Larsen, petitioner's engineer, entered the engine room sometime before 8 o'clock on August 24th, 1943. (R. 57-58). Larsen remained in the upper portion of the engine room. Rivas went down below to the portion of the engine room referred to as the fire room, (R. 57) a small compartment between the boilers amidships and the engine frame astern (R. 30). The lighter was due to proceed from the center of the pier, where it had been tied up for some nine hours, to the end of the pier sometime at or after 8 o'clock (R. 124-126). During the interval and before any bells were received Larsen was engaged in getting ready to proceed to the end of the pier and while he could not see the whole fire room, he did know that Rivas was cleaning up down below and in fact saw him in this process and spoke to Rivas regarding such cleaning. Aside from this speech with Rivas, Larsen at no time thereafter spoke to or saw Rivas (R. 63). In due course a jingle bell to stand by was received, followed shortly thereafter by a forward signal at half speed, a full speed signal, and a few seconds before coming into the pier, a signal to kick the engine into reverse to stop headway. During this time, Larsen testified the steam had been rising steadily. (R. 63)

Immediately upon coming into the pier, Larsen looked down and saw Rivas stretched out on the starboard side of the fire room, his feet approximately even with the center pole which holds up the railing around the eccentrics, his feet being further to the stern than his head. (R. 78-79). Within a few seconds, Larsen was down in the fire room and the wound on Rivas' head had already stopped bleeding upon his arrival. (R. 103).

The voyage from the middle of the pier to the end of the pier took a maximum of from five to ten minutes. (R. 68, 130). The reversing process engaged in by Larsen for the purpose of controlling headway at the end of the pier was a matter of only seconds before he observed the body of Rivas lying on the floor space below him. (R. 70).

Dr. Edward Alpert, the Jersey City police surgeon who examined the body of Rivas, testified that the type of blow causing the death was a "terrific blow" coming from the right side, that it was a straight smash, and that the wound would have bled for a period of between five and ten minutes.

Robert Haight, an expert, testified that the only instrumentality in the fire room which had sufficient power to cause such an injury was the reversing links which were operated independently of the engine proper by a steam ram. R. 166). He testified further that the reversing mechanism, prior to starting the engine, was employed to put the eccentrics in a proper position for starting. (R. 173).

Lopez, a fireman, who usually relieved Rivas aboard this lighter testified that standing upon the railing around the eccentrics was the only manner in which the upper part of the engine frame could be reached for cleaning and that it was the duty of the fireman to have the engine room cleaned before turning over to the new watch that relieved him. (R. 116).

Larsen admitted that no ladder or other instrument was provided for use in the fire room proper. (R. 93).

After hearing all of respondent's witnesses, the expert, Haight, testified that in his opinion the blow described by the doctor could only have been received by Rivas while standing on the railing (R. 177); and that it could only have been received by him prior to any bells and when the engine was being readied for operation. (R. 176-181). He proved by demonstration that the accident could not have happened in any other manner.

Larsen admitted that he gave no warning at any time that morning to Rivas (R. 86); that he made no attempt to ascertain the whereabouts of Rivas in the fire room prior to moving the engine even though he admitted also that it was his duty, as the person having complete charge of the

engine and reversing controls, to ascertain that nothing was at or near these instruments prior to moving them. (R. 76).

At the end of the respondent's case the petitioner failed to offer any evidence to rebut or vary respondent's case.

POINT I

Decision of Circuit Court is not in conflict with decisions of this Court or other Circuit Courts.

The petitioner attempts to convey the thought that *Brady* v. *Southern Railway Co.*, 320 U. S. 476, is in conflict with the decision of the Circuit Court of Appeals in the instant case. The question raised in the North Carolina State Court in that case was whether the death could have been caused by employees of the respondent or by the decedent himself. To find for one would not exclude the other and therefore clearly the answer could only be arrived at through speculation. In the present case the machine causing decedent's death was wholly within the control of the petitioner's engineer. There is no evidence to sustain any other possible contention than that this machine was the actual cause of death. Petitioner's employee admits that no warning of any kind was given. (R. 86) The physical facts surrounding the occurrence gave the jury, in the instant case, more than sufficient evidence to find as they did.

In *Atcheson, Topeka & Santa Fe R. R. Co.* v. *Toops*, 281 U. S. 315, there was no evidence of the surrounding circumstances from which any inferences could be drawn hence to find in favor of the plaintiff would have involved considerable conjecture on both the question of negligence and the question of proximate cause.

In *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 486, the facts were such that there was no alternative but to find that the decedent acted in disobedience of direct orders

to avoid the instrumentality that caused his death and further there was a complete lack of any evidence of surrounding facts to explain how he actually did fall into the bins in which he was found dead a short time after last being seen in their locality.

How the petitioner can claim that the Circuit Court of Appeals by its decision has put this case in conflict with those above mentioned is hard to understand. The opinion of the Court below almost in its entirety was devoted to an exposition of the evidence which the Court felt raised sufficient inferences upon which a jury could reasonably draw the conclusion that the injuries suffered by the respondent's intestate were caused by the negligence of the petitioner.

Apropos of the purported conflict in the decision of the present case with that of the Circuit Court of Appeals for the Fifth Circuit in *Asprodites* v. *Standard Fruit and Steamship Co.*, 108 Fed. (2d) 728, cert. den. 310 U. S. 642, there can be no comparison worthy of argument. In the *Asprodites* case, there was no jury verdict involved and the legal question discussed and decided was solely whether the plaintiff in a death action under the Jones Act could rest on the theory of *res ipsa loquitur* after showing the occurrence and the death resulting therefrom. The record in the present case will disclose that no such theory was raised or contemplated on the trial of this action nor on the appeal.

The conflict between this case and those cited above, if any, is one of fact and not of law.

POINT II

The decision of this Court in *Tennant* v. *Peoria & Pekin Union Railway Co.*, is controlling in the present case.

The petitioner lays great emphasis upon the *Brady* case throughout his application to this Court. No mention, however, is made of the later case of *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321 U. S. 29. By a happy coincidence the facts in the *Tennant* case and those in the respondent's are so closely analagous that we may well rely upon this Court's holding in that case to confound all the contentions advanced by the petitioner herein.

The petitioner seeks to argue in this case that the absence of eye witness testimony regarding the precise whereabouts of respondent's intestate at the time he met his death, leaves any determination of how he lost his life to speculation and conjecture. As was indicated by this Court in the *Tennant* case the surrounding circumstances—the location of the body, blood stains and so forth—constitutes strong evidence of the manner and locale of the death. The respondent's contention that the intestate was standing on the railing surrounding the engine frame is buttressed by the fact that the links were the only instrumentality in the engine room that had sufficient power to cause the injuries testified to by the police surgeon. The absence of eye witnesses was definitely held by this Court not to be decisive.

As a matter of fact this Court added to the evidence before it in the *Tennant* case the legal presumption that decedent was actually engaged in the performance of his duties and exercised due care for his own safety at the time of his death, where there was no evidence which could be called upon to dispute such a presumption. Clearly in the present record no evidence was produced to dispute such a presumption. The only witness who testified to the facts and circumstances surrounding the accident was the peti-

tioner's own engineer who testified that the respondent's intestate was engaged in the performance of his duties and in fact supplemented his testimony with compliments to the said intestate's ability as a fireman and oiler. The only point upon which the said engineer could not testify with any certainty was the exact position of the decedent during the time the engine was in operation. Yet his testimony was clear and convincing that not knowing the precise whereabouts of the fireman he moved the engine without first warning the fireman of his intentions. As was held in the *Tennant* case, such a movement without a warning was clearly dangerous to life and limb.

CONCLUSION

The petition for a writ of certiorari should be denied.

(The Court is respectfully informed that the respondent, widow of deceased and her infant daughter, having been deprived of the support of her husband, are both at present in dire need of financial aid and this Court is respectfully requested to grant to this application such preference as may be afforded it under the rules and practice in this Court.)

Respectfully submitted,

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